IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 687 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

and

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NAGAJI LALA

Versus

STATE OF GUJARAT

Appearance:

MR ND NANAVATI for the appellant.

Mr. B.D. Desai, APP for the Respondent.

CORAM : MR.JUSTICE M.H.KADRI

and

MR.JUSTICE H.R.SHELAT

Date of decision: 21/11/2000

ORAL JUDGEMENT

(Per : MR.JUSTICE H.R.SHELAT)

The appellant, on being convicted of the offence

punishable under Section 302 of the Indian Penal Code on 19th June 1990, by the then learned Additional Sessions Judge, Junagadh, in Sessions Case No. 18/90; and sentenced to life imprisonment, has preferred this appeal calling in question the legality and validity of the conviction.

2. Lalaji Ramji, the complainant belongs to Nojanvav Village in Junagadh district. He is having a pan beedi shop which was also attended by Mansukh, his son. On 14th December 1989 Lalaji Ramji was at home while Mansukh the deceased was attending the shop. The appellant wanted to purchase beedi of the brand he was regularly smoking, but on that day no where beedi of that brand was available in the village. He therefore at 17.45 hours had gone to the pan beedi shop of Lalaji Ramji. After going to the shop the appellant altercated and started to scuffle with Mansukh. Both while scuffling came out of the shop and during the scuffle the appellant gave knife blows. Mansukh was seriously injured. At that time Haresh, his brother had gone to the shop. The things in the shop were lying scattered. Collecting those things and putting the same in order as well as locking the shop Haresh took his brother Mansukh to home carrying him on the pillion seat of his cycle. Lalaji Ramji inquired as to what the matter was ? Mansukh informed him that the appellant had caused the injury by giving knife blows, one on the shoulder and another on his back. Mansukh was then taken to the hospital at Mendarda where the doctor declared him dead. A complaint with Mendarda police station was then lodged relating to the offence of murder. During the course of the hearing it was divulged that about 7 to 8 months prior to the date of the incident appellant had gone to take pan at the shop of Lalaji Ramji. At that time, Lalaji and his Son Haresh were in the shop. The appellant wanted to sit on the tilt of the shop. Lalaji Ramji did not permit him to sit. The appellant then took ill. He abused Lalaji Ramji and also beat him & Haresh, and threatened them with death if at all a complaint against him with the police was lodged. Thereafter a complaint qua the said incident was lodged with Keshod police station. After the inquiry was over a chargesheet against the appellant was also filed in the Court and that complaint is at present pending. Over and above such complaint, a chapter case under Section 107 of the Criminal Procedure Code is also initiated against the appellant. The appellant any how therefore wanted to have the settlement qua these two cases. He had therefore on the day of the incident gone to the shop where Mansukh was there and in connection with the settlement there was altercation

initially and thereafter the same was followed by scuffle and use of force. Ultimately Mansukh lost the life because of the injuries he sustained, owing to the knife blows showered on his person by the appellant.

3. At the conclusion of the investigation, the police filed the chargesheet against the appellant relating to the offence of murder punishable under Section 302 of IPC in the Court of the Judicial Magistrate(F.C.), Keshod. The J.M.F.C. of that Court committed the case to the Court of Sessions at Junagadh as he was not competent to try the offence of murder. The case was then registered as Sessions Case No. 18/90, and was assigned to the then learned Additional Sessions Judge, Junagadh for hearing and disposal in accordance with law. Hearing the parties the charge (Ex.01) was framed against the appellant who pleaded not guilty and claimed to be tried. The prosecution then adduced necessary evidence. Appreciating the evidence before him, the learned Additional Sessions Judge reached the conclusion that the prosecution had succeeded in establishing the charge levelled against the appellant. He therefore held the appellant guilty and sentenced him as aforesaid. It is against that judgment and order of conviction and sentence the present appeal is filed.

4. Before we proceed to dissect the merits, it may be stated that the appellant before the Sessions Court came out with a case of self-defence filing his reply at Exhibit 38. Admitting about the incident that took place few months prior to the incident in question and in that regard making it clear that he had no dissension whatsoever he has stated that after that incident he was not going to the shop of Lalaji Ramji, the complainant but on 14th December 1989 the day of incident he wanted to purchase the beedi of the brand he was usually smoking but it was not available any where in the village. He had therefore gone to the shop of the complainant for purchasing the beedi. He after going to the shop requested Mansukh the deceased to give beedi. Seeing him Mansukh was enraged and being ireful & retributive, started to vituperate him & behave curtly. When he tried to bring him to reason, fiery Mansukh caught him by his neck. He tried his best to get rid of the same. Mansukh then jumping over the tilt came to the road and started to beat him. Not only he was knocked down on the road but Mansukh also climbed over his body and furiously pressed his throat so as to strangle. He was struggling for getting rid of the grisly grip of Mansukh. At that time he sustained abrasions on the back. While struggling for his safe release he caught the waist of

Mansukh wherefrom he took out the knife and in order to save himself he gave the knife blows and caused injuries to Mansukh. Mansukh then caught his hand by which he was wielding the knife and there was a scuffle. He left the place soon after the grip of Mansukh was loosened. Thus, the appellant has come out with the defence that in order to save his life he by using the required force and taking knife from the waist of Mansukh gave the blows as a result Mansukh sustained the injuries. When the appellant has come out with the case of self defence, no other points are required to be inquired into or dissected. The only point that arises for consideration is whether the appellant had a right to use the force in self-defence available in law, or had gone to the shop for getting the dispute settled, if required by using force and thereby he became the aggressor.

5. Gulabbhai Valibhai (Ex. 14) was as per the case of the prosecution present at the shop, but he has not supported the case of the prosecution stating that initially both the appellant and Mansukh were talking, but he could not hear because taperecorder was being played loudly and thereafter both were scuffling and he with a view to avoid his involvement left the shop. He has then showed ignorance about the happening thereafter. He is hence declared hostile. Haresh, the brother of Mansukh(Ex.12) had gone to the shop, some times after the incident had already commenced, riding over the cycle. He could see that appellant and his brother Mansukh were scuffling on the road and during this scuffle the appellant gave two knife blows, one on the shoulder and another on the neck and then the appellant scuttled. He took his brother Mansukh to his home by the cycle he was having and then to the hospital at Mendarda. He thus supports the case of the prosecution stating about the staggerer. He has also denied the case of self-defence when in the cross-examination necessary questions thereof were put to him. Bhagwanji Heera (Ex.13) is having a grocery shop, near to the shop of Lalaji Ramji. He could see the incident. He has supported the case of scuffle between the appellant and deceased Mansukh and has also supported the case of injury having been caused by knife by the appellant. He has also stated that Haresh, the brother of Mansukh had been to the place of incident and he took Mansukh to his house by the cycle closing the shop. Regarding the cause of incident, this witness also supports the case of prosecution narrating the incident that occurred 7 to 8 months prior to the incident. The evidence of both these witnesses no doubt supports the case of prosecution but their evidence shows that both could not know how the incident commenced. Haresh had

gone after the incident had already commenced, while Bhagwanji's attention was attracted after he heard shouts and saw rowdy commotion. The evidence of both the witnesses is of no help to know who was the aggressor.

6. A circumstance on record throwing light on the point to be determined cannot be lost the sight of. Before we proceed, it must be mentioned what was the submission before the lower court. The learned Additional Sessions Judge, in his judgment has in clear terms stated that both the parties at the time of making submissions before him made it clear that the deceased was having no knife or weapon with him at the time of incident. A clarification of such fact gives fatal blow to the defence taken. When the deceased was having no knife or any other thing or weapon it was not at all possible for the appellant to take out the knife from the waist of the deceased and use the same for his self-defence as sought to be canvassed before us. Such fact or stand taken shows that taking knife appellant had gone to the shop to settle the score.

7. It may be stated that the doctor could note 3 injuries on the person of Mansukh. The evidence of above two witnesses shows that two injuries were caused on the road. The police while drawing the panchnama of the scene of offence found that on the tilt of the shop blood marks were found and some blood was found on the road. The group of the said marks was of the deceased's blood. The blood mark found on the tilt indicates that assaulting first injury to the deceased must have been caused when Mansukh the deceased was sitting on the tilt and that too by the appellant after going there under the guise of purchasing the beedi of the brand he was usually smoking. Thereafter both were scuffling and it was because the appellant who had become fiery and was attacking with knife, Mansukhbhai must be trying to save himself, and during scuffle he succeeded in going out of the shop. The appellant who wanted to have the result as per his malice had also while scuffling gone to the road where Mansukh succeeded in knocking down the appellant, and in order to save himself and see that the appellant losing the grip leaves the knife there, he pressed the neck of the appellant. At that time, with the knife he was having, the appellant gave blows & caused injuries to the deceased. The point for determination at this stage that arises for consideration is whether appellant can in such circumstances plead a case of self-defence. As stated above, he was the aggressor and if the person assailing first causes injury, comes to be put to perilous situation, cannot with a view to ward off

assault on him, cause injury to the person who had become the victim of his assault under the guise of self-defence. A similar view has been taken by the Supreme Court in the case of Pammi Alias Brijendra Singh Vs. Govt. of U.P. - 1998 SCC (Cri.) 673 laying down that a right of private defence cannot arise against an act of self-defence. In that case what happened was that the aggressor and his accomplish equipped with fire-arms entered the house to settle the score at night time and the occupant of the house resisted the force they were exercising so as to have his self-defence. It was then held that the accused could not claim any right of self-defence even if the deceased the occupant of the house had taken out iron rod to defend themselves. At the cost of repetition, we state that in the case on hand, the appellant had gone to the shop taking the knife with him and he under the pretext of purchasing the beedi picked up the quarrel, scuffled with Mansukh and gave the blow as a result deceased's blood dropped on the tilt and thereafter the deceased who was trying to save himself went out of his shop scuffling with the appellant where as stated above the appellant caused injuries to Mansukhbhai giving two more blows by the knife he was having. The appellant thus being the aggressor cannot take the recourse of a plea of self-defence. He has shrewdly taken the plea of self-defence so as to screen himself from the liability that in law follows after first committing a wrong. In the eye of law, he in such facts loses the right to plead a case of self-defence so as to avoid consequences of the wrong done.

8. Learned advocate representing the appellant, at this stage, submits that the evidence of Haresh and Bhagwanji Heera even to a certain extent or for some part of the incident cannot be accepted being unreliable. They were the witnesses got up subsequently. Haresh was studying in the school at Arniyala and could not have returned from the school at the time when the incident happened. Haresh has explained in this regard stating that no doubt he had gone to the school on that day but during the recess taking leave of his teacher he had gone to the shop for leaving the stack of waste papers. He had then gone back to his house and then reached the shop. At that time he saw the incident, i.e. scuffle on the road. His such explanation is not assailed by the other side and further because of the peculiar defence taken by the appellant indicating about the happening of the incident, the evidence of Haresh cannot be stamped as unreliable and on that count cannot be kept out of consideration. Likewise a case of evidence of Bhagwanji Heera, cannot be discarded and further nothing in the

cross-examination except assailing him in general that he was telling a lie is asked specifically indicative of the fact that he was supporting the case of prosecution, deliberately becoming a venal.

9. The learned advocate for the appellant at this stage submits that the blood marks found on the tilt cannot be taken to be the decisive factor as the possibility that Haresh might have gone to the shop after his clothes were bloodstained cannot be ruled out, and the blood on the tilt must have dropped on the tilt from his clothes. There is nothing on record that Haresh, seeing the incident and before going to the shop for the purpose of collecting the scattered things and putting the same in order in shop and locking the shop had gone to his brother and had assisted him in getting him seated properly on the pillion-seat of the cycle. What appears from his evidence is that after locking the shop he went to his brother & not prior to it and caused him to sit on the pillion-seat of the cycle. Till then Mansukh was though injured was standing aside. What follows from such facts is that when Haresh went into the shop for the purpose of locking and collecting the scattered things, beedi etc., neither his hands nor his clothes were bloodstained. Such facts on record rules out the possibility of dropping of the blood on the tilt because the clothes or the hands of Haresh were stained with blood.

10. For the aforesaid reason, the learned Additional Sessions Judge was perfectly right in holding that plea of self-defence was raised just to screen himself from the consequences, discarding the right of self-defence and convicting and sentencing the appellant as aforesaid.

11. Some of the decisions are shown to us by the learned advocate representing the appellant. In the case of Periasami and Anr. Vs. State of T.N. - (1996) 6 SCC 457, it is laid down that no presumption that the accused is the aggressor in every case of homicide arises. Benefit of reasonable doubt that it was the deceased party that was the aggressor would go to the accused even though he does not adduce any evidence. There can be no doubt regarding the principle made clear by the Supreme Court. On the basis of the presumption one cannot jump to the conclusion that in all cases the accused will be the aggressor. Whether the deceased was the aggressor or the accused has to be judged on the facts and circumstances of each case. We have, as discussed above, found that the appellant was the aggressor and when the facts on record accordingly indicate, no other view on

the basis of the decision cited can be taken.

12. The right of private defence to the extent of causing death has to be judged on the reasonable apprehension of the accused and from the subjective point of view of the accused, and cannot be subjected to microscopic and pedantic scrutiny. For such submission, attention is drawn to the decision in the case of Wassan Singh Vs. State of Punjab - (1996) 1 SCC 458. This decision cannot be pressed into the services of the appellant for the aforesaid reason that the appellant being the aggressor has disqualified himself for availing of the benefit of self-defence and therefore it is not to be judged from the subjective point of view of the appellant.

13. In this case Mohanbhai Karamshibhai Thumar, (Ex.6), the doctor when examined the appellant on 15.12.89 found about six abrasions on the shoulder, elbow, right upper arm and back side. It is therefore the contention of the learned advocate representing the appellant that the prosecution has not explained these injuries sustained by the appellant. It may therefore be held that the prosecution was suppressing the genesis of the incident and the case of the prosecution was not worthy of credence while the case of self-defence taken by the accused was trustworthy. In support of his such submission, a reliance is placed on the decision of the Supreme Court in the case of Sukhdev Singh And Another Vs. State of Punjab & Others - 1997 SCC (Cri.) 831, wherein it is held that if the specific plea of private defence is taken by the accused and the prosecution omits to explain the injuries, the same may lead to adverse inference. No doubt, the prosecution has to explain the injuries if at all sustained by the accused in the incident in question, but the prosecution is not bound to explain the same if those injuries are not visible. The injuries, namely the abrasions sustained by the appellant were not, because of the clothes he had put on, visible, and secondly the same is self-explanatory because of the theory of self-defence put forth by the appellant himself. He was knocked down on the road and during the scuffle according to him the deceased had sat over his body and was pressing his neck as a result of which he was struggling for escaping out of the grip of the deceased. He therefore sustained the abrasion because of brushing and grazing with the rough surface on the road. In view of the fact, if the injuries, namely the abrasions sustained by the appellant are not explained by the prosecution, the same is not fatal as canvassed, and theory of self-defence found to have been got up cannot

find favour.

14. In the last case of S. Velayudhan Vs. Krishnan & Others AIR 1998 SC 2878, cited by the learned advocate for the appellant, what happened was that the accused had committed the murder and the version of the prosecution as well as defence up to certain point were same. The eye witnesses who were the close relatives of the deceased did not explain the injuries on the person of the accused. It was then held that accused could not be said to be the aggressor. Because of the peculiar facts of that case, the Apex Court held so, but it is not the principle in general laid down by the Supreme Court which would apply to all cases mechanically. Who was the aggressor has to be judged, on the facts and circumstances of each case, and we have, for the reasons stated hereinabove, found that the appellant was the aggressor. With the result, it is not open to him to take the shelter of self-defence so as to get out from the consequences that follow after he committed the wrong in law. The decision cited, therefore, cannot help the appellant, and the contention raised does not gain a ground to stand upon. On no other count, submissions are advanced.

15. For the aforesaid reasons, we do not see any justifiable reason to interfere with the findings of the lower Court. We have carefully gone through the Judgment of the lower Court, and we generally agree with the reasonings. It is, therefore, not necessary to restate the same.

16. In view of what we have said hereinabove, the appeal being devoid of merits is liable to be dismissed and is accordingly dismissed, maintaining the order of conviction and sentence.
rmr. =======